IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re:	§	**Chapter 11**
KRISJENN RANCH, LLC,	§	
Debtor	§	**Case No. 20-50805**
	§	

KRISJENN RANCH, LLC and KRISJENN RANCH, LLC-SERIES UVALDE RANCH, and KRISJENN RANCH, LLC-SERIES PIPELINE ROW as successors in interest to BLACKDUCK PROPERTIES, LLC,	§	
Plaintiffs	§	
v.	§	
DMA PROPERTIES, INC., and LONGBRANCH ENERGY, LP,	§	**Adversary No. 20-05027**
Defendants	§	

DMA PROPERTIES, INC,	§	
Cross-Plaintiff/Third Party Plaintiff	§	
v.	§	
KRISJENN RANCH, LLC, KRISJENN RANCH, LLC-SERIES UVALDE RANCH, and KRISJENN RANCH, LLC-SERIES PIPELINE ROW, BLACK DUCK PROPERTIES, LLC, LARRY WRIGHT, and JOHN TERRILL	§	**Adversary No. 20-05027**
Cross-Defendants/Third-Party Defendants	§	

KRISJENN RANCH, LLC, KRISJENN RANCH, LLC-SERIES UVALDE RANCH, AND KRISJENN RANCH, LLC-SERIES PIPELINE ROW, AS SUCCESSORS IN INTEREST TO BLACK DUCK PROPERTIES, LLC'S SUR-REPLY TO DMA PROPERTIES, INC.'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON DMA'S OWNERSHIP INTEREST IN THE BIGFOOT NOTE PAYMENTS

TO THE HONORABLE CHIEF BANKRUPTCY JUDGE RONALD B. KING:

COME NOW Debtors, Plaintiffs, and Counter-Defendants KrisJenn Ranch, LLC, KrisJenn Ranch, LLC-Series Uvalde Ranch, and KrisJenn Ranch, LLC-Series Pipeline Row (collectively

the "Debtors"), and file this Sur-Reply to DMA Properties, Inc.'s Reply in Support of Motion for Partial Summary Judgment on DMA's Ownership Interest in the Bigfoot Note Payments, and would respectfully show as follows:

ARGUMENT

I. DMA Cannot Raise Arguments for the First Time in Its Reply Brief

"[I]t is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief." *Benton v. Laborers' Joint Training Fund*, 121 F.Supp.3d 41, 51 (D.D.C. 2015); *see also McBride v. Merrell Dow & Pharm.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) ("Considering an argument advanced for the first time in reply brief . . . is not only unfair . . . , but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." (citations omitted)); *Conservation Force v. Salazar*, 916 F.Supp.2d 15, 22 (D.D.C. 2013) (holding a party forfeits argument made for the first time in its reply brief); *Baloch v. Norton*, 517 F.Supp.2d 345, 348 n.2 (D.D.C. 2007) ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply."). Courts in the Fifth Circuit "do not consider new arguments brought up at this late stage." *See Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) ("Reply briefs cannot be used to raise new arguments.").

Here, DMA attempts to argue it is a third-party beneficiary for the first time in its reply brief. Debtors should not be required to anticipate arguments that have not been made in DMA's motion for summary judgment. Debtors' response addressed the arguments that were made in DMA's motion, and DMA should be precluded from now raising new arguments for the first time in its reply brief because Debtors are deprived of the opportunity to respond to these arguments.

DMA asks this Court to assume, as a matter of law, that DMA is the intended third-party beneficiary of a contract between Black Duck and SCMED. While that issue may need to be resolved by the Court, DMA failed to raise the argument in its motion for summary judgment, and is not entitled to this assumption as a matter of law. To hold otherwise would not only be unfair, but it would also entail the risk that this issue will not be fully developed on the summary judgment record. For these reasons, the Court should ignore DMA's third-party beneficiary arguments that were raised for the first time in its reply to Debtors' opposition. *See Baloch*, 517 F.Supp.2d at 348 n.2; *see also Hollis*, 827 F.3d at 451. Absent DMA meeting its burden regarding third-party beneficiary status, DMA is unable to show the contract between DMA and Black Duck is supported by consideration. Therefore, the Court should deny DMA's Motion for Partial Summary Judgment on the Bigfoot Note Payments.

Alternatively, the Court should allow Debtors adequate time to respond to the new arguments raised in DMA's reply. The Fifth Circuit has stated that Federal Rule of Civil Procedure 56 "requires the court to give the non-movant an adequate opportunity to respond prior to a ruling." *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004). "Although the [Fifth Circuit has] not comprehensively identified all the circumstances under which a district court may rely on arguments and evidence presented for the first time in a reply brief . . . , those circuits that have expressly addressed this issue have held that a district court may rely on arguments and evidence presented for the first time in a reply brief as long as the court gives the nonmovant an adequate opportunity to respond." *Id.*

WHEREFORE PREMISES CONSIDERED Debtors pray that this Court issue an order denying DMA Properties, Inc.'s Motion for Partial Summary Judgment on DMA's Ownership Interest in the Bigfoot Note Payments, or, alternatively, give Debtors adequate time to respond to

the new issues raised in DMA's reply brief, and for such further relief as the Court may deemed them justly entitled.

Dated: October 11, 2020.

Respectfully submitted,

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By: /s/ *John Muller*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record by way of e-service through the CM/ECF system by notice of electronic filing or via email on the 11th day of October 2020:

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